

March 22, 2019

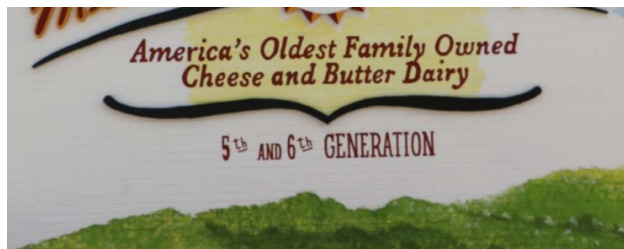
IN THE 7TH CIRCUIT, WISCONSIN BUTTER STANDARD MAKES THE GRADE

BY: JACOB ROBBINS

Every state has trademark industries that confer a sense of identity and provide valuable symbols for use in the national marketplace. For instance, Kentucky leans heavily on its bourbon industry, whether through direct market participation or in driving tourism. In a similar vein, Wisconsin has historically been best known for its dairy industry.^[i] The state's identity is so entwined with the dairy industry that its license plates bear the slogan, "America's Dairyland."^[ii] So protective of this identity are Wisconsinites, that when local business leaders tentatively pushed for a change to the slogan emblazoned on the plates, a public uproar ensued.^[iii] Given this reaction, it should come as no surprise that the state's laws reflect a similar seriousness when it comes to ensuring the quality of the butter sold in Wisconsin.

In 1953, the Wisconsin legislature enacted a butter-grading law that affected all butter sold in the state.^[iv] To be sold in Wisconsin, butter must be labeled with a grade that reflects its assessment under either the Wisconsin or USDA grading systems, which are largely the same.^[v] The grading system takes into account an "examination for flavor and aroma, body and texture, color, salt, package and . . . other tests or procedures . . . for ascertaining the quality of butter."^[vi] The statute confers the power to assign grades exclusively to butter graders licensed by the state of Wisconsin.^[vii] Though this law has been on the books for the better part of 70 years, it has only recently become a source of discord. This is likely because this particular provision has not been enforced in this manner for a very long time; in fact, enforcement of this requirement began in 2015.^[viii] This has caused brands both popular and obscure to be pulled from store shelves, including the nation's second best-selling butter, Kerrygold.^[ix] Of particular interest to this blog post is the suit brought against Wisconsin by an Ohio-based butter maker, Minerva Dairy.^[x]





credit (<https://s3-wp-lyleprintingandp.netdna-ssl.com/wp-content/uploads/2016/06/07102734/Minerva-Dairy.jpg>)

Minerva's claims were grandiose in scope and language, but that is not unusual when a local law affects economic actors from other states. Lawyers for Minerva challenged Wisconsin's butter-grading requirement on three grounds: (1) as a violation of the Due Process Clause; (2) the Equal Protection Clause; and (3) the Dormant Commerce Clause.[xi] In support of these constitutional arguments, they argued that the state's interest in ensuring butter quality is not rationally served by the involuntary application of such a subjective test, that the law discriminates irrationally between butter and other similar commodities, and that forcing out-of-state graders to come to Wisconsin to become certified discriminated against out-of-state dairies.[xii]

As expected, the state's arguments were essentially the inverse of Minerva's. First, Wisconsin claimed that the grading and labeling scheme advanced the legitimate state interests in better informing customers and promoting commerce.[xiii] Second, because the testing requirement is not subjective but instead accurately reflects consumer preferences, it rationally serves the state's interest in ensuring butter quality.[xiv] Finally, it is reasonable that butter is the only commodity for which the quality testing is compulsory because butter is substantially different from other commodities. [xv]

In finding for the state of Wisconsin, the Seventh Circuit was, for the most part, quite compelling. The court correctly found that the Commerce Clause challenge should fail because the grading system applied to everyone, and that the qualification to test butter was not overly difficult to attain or maintain.[xvi] As to the Due Process and Equal Protection claims, the court indicated that because the standard of review required only that Wisconsin have a rational basis for the law, that bar was easily met by the two legitimate interests it expressed.[xvii] Interestingly and perhaps somewhat alarmingly, the court further opined that Wisconsin need not present evidence or that the law served the legitimate interest; Wisconsin simply needed a stated rational basis.[xviii] Thus, the court seemed ready to legitimize any reasoning advanced by the state so long as it was plausible, even if the facts in no way supported the proposition.

The court somewhat conveniently found that even if Wisconsin had needed to provide evidence to support their reasoning, the statute would survive because a state expert testified that the range of characteristics that reflect consumer preference *are a known quantity*, in effect arguing that taste is not subjective *for butter in particular*. [xix] Putting aside the dubious judgment of the court to accept at face value that the public taste for butter is quantifiably uniform, the court was ready to accept the state's argument *even if* the plaintiffs had shown there was a wide range of qualities that the grading system did not adequately represent. If, for instance, the plaintiffs had shown inconsistencies between graders, or that in blind taste tests consumers had consistently rated butters of a uniform grade differently, the court would have deemed that immaterial to their decision. The court did not have to deal with that question here, and it seems inevitable that such a hands-off approach will inevitably lead to the court having the revisit the wisdom of this standard of review, which readily prioritizes the value of speculation over fact so long as it is advanced by the legislature.

[i] Hope Kirwan, *Is Wisconsin Still 'America's Dairyland' Or Does It Need A New Slogan?*, NPR (Nov. 1, 2018), <https://www.npr.org/sections/thesalt/2017/11/01/561427862/is-wisconsin-still-americas-dairyland-or-does-it-need-a-new-slogan>.

[ii] *Id.*

[iii] *Id.*

[iv] *Minerva Dairy, Inc. v. Brancel*, No. 17-cv-299-jdp, 2018 U.S. Dist. LEXIS 18255 (W.D. Wis. Feb. 5, 2018)

[v] *Id.*

[vi] Wis. Stat. Ann. § 97.176.

[vii] *Id.*

[viii] *Selling Kerrygold Butter No Longer A Criminal Offense In This US State*, IrishCentral (May 2, 2018), <https://www.irishcentral.com/culture/food-drink/kerrygold-butter-wisconsin-legal>

[ix] *Id.*

[x] Rick Barrett, *Court Upholds Wisconsin's Law That Grades Butter By Taste*, Milwaukee Journal Sentinel (Oct. 4, 2018, 4:36 PM), <https://www.jsonline.com/story/money/business/2018/10/04/court-upholds-wisconsins-butter-law-grades-butter-taste/1526282002/>

[xi] *Minerva Dairy, Inc. v. Harsdorf*, No. 18-1520, 2018 U.S. App. LEXIS 28012 (7th Cir. Oct. 3, 2018).

[xii] *Id.*

[xiii] *Id.*

[xiv] *Id.*

[xv] *Id.*

[xvi] *Id.*

[xvii] *Id.*

[xviii] *Id.*

[xix] *Id.*

♥ 0 Likes ➦ Share

COMMENTS (0) [Newest First](#) [Subscribe via e-mail](#)

Preview POST COMMENT...

Newer Post

The Privy Exception for Packaged Animal
Food (/full-blog/tennisblog2)

Older Post

GAMBLING ON KENTUCKY'S FUTURE:
THE IMPACT MURPHY V. NCAA HAS
ON THE COMMONWEALTH (/full-
blog/johnpaulhicksblog1)

SEARCHABLE ARCHIVE (/PUBLICATION-ARCHIVE-1)

631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 BLOG.KJEANRL@GMAIL.COM (MAILTO:BLOG.KJEANRL@GMAIL.COM)